IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-526

JESUS NOVELO FERREIRA,

Petitioner,

v.

DAMPSKIBSSELSKABET NORDEN A/S and the M. S. NORDPOL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS INVOLVED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	4 4
REASONS FOR GRANTING THE WRIT	7
APPENDIX A–(Judgment and Written Reasons for Judgment of the United States District Court for the Eastern District of Louisiana)	1a
APPENDIX B–(Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit)	1b

TABLE OF AUTHORITIES

Cases:

Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970)	11
Kyriakos v. Goulandris, 151 F.2d 132, (2d Cir. 1945)	7
Lauritzen v. Larsen, 345 U.S. 571 (1953)	2

Statutes:

The Jones Act, 46 U.S.C. 688	3

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered and rendered on July 3, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana, New Orleans Division,

is unreported; it appears in the record at pages 55 through 61, and is printed in Appendix A hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit, dated July 3, 1972, is not yet reported, but is printed as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered and entered on July 3, 1972, and is printed as Appendix B hereto. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED

1. Whether as has been held by the United States Court of Appeals for the Second Circuit,[1] the facts that a foreign seaman (a) signed on in an American port for a voyage beginning and ending in American waters, and (b) was injured in an American port, are alone enough to fulfill the minimum requisites for application of the Jones Act to his claim for damages arising from the injury?

2. When the seven considerations of *Lauritzen v. Larsen*, 345 U.S. 571, are found as follows, which law is to apply:

(1) Place of Wrongful Act is New Orleans, Louisiana – favor U.S. law;

(2) Law of the Flag is Danish – favor Danish law;

(3) Allegiance or domicile of the injured is Mexico – favor Mexican law;

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[1] *Kyriakos v. Goulandris*, 151 F.2d 132 (2d Cir. 1945).

(4) Allegiance of defendant shipowner is Danish – favor Danish law;

(5) Place of Contract is New Orleans, Louisiana – favor U.S. law;

(6) Inaccessibility of Foreign Forum – favor U.S. law;

(7) The Law of the Forum – favor U.S. law.

STATUTES INVOLVED

The statute involved is the Jones Act, 46 U.S.C. 688, which is as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

Petitioner, a seaman, brought this suit in admiralty, seeking damages against his employer [the shipowner] for personal injury he sustained in the Port of New Orleans, Louisiana, on March 22, 1971.

He claims relief under the Jones Act, 46 U.S.C. 688, and pursuant to the general maritime law of the United States including the doctrine of unseaworthiness.

Defendant moved for summary judgment claiming that the Court has no jurisdiction, and alternatively, that if the Court has jurisdiction, Danish law should apply rather than the Jones Act and the general maritime law.

The district court granted the motion for summary judgment and dismissed petitioner's suit. The United States Court of Appeals for the Fifth Circuit placed the matter on its summary calendar without allowing oral argument and affirmed the district court without giving written reasons.

STATEMENT OF THE FACTS

On March 22, 1971 petitioner was injured on board the NORDPOL while the NORDPOL was in the Port of New Orleans, Louisiana.

Petitioner was hired by respondent in New Orleans, Louisiana, on March 8, 1971, fourteen days before the accident and boarded the vessel there. The vessel made a trip to Houston, Texas, and returned to New Orleans, where it was at the time of the accident.

Petitioner was 24 years old at the time of the accident. He had been going to sea for approximately 4 years prior to the accident. Though he is a Mexican citizen, all of his

seafaring voyages were from ships on which he had been hired at the Port of New Orleans and from which he had been discharged at the Port of New Orleans [except for one instance in which he was discharged at Galveston, Texas, and reported the next day to New Orleans, Louisiana].

The respondent owners of the NORDPOL are members of what is known as the Scandinavian Ship Owners Association, which obtains seamen from certain ports in the United States through the Scandinavian Shipping Office, Inc.

The Scandinavian Shipping Office, Inc. operates as follows:[2] Seamen who are in the United States Ports of New York, San Francisco or New Orleans register with the Scandinavian Shipping Office, Inc. by giving their name, employment history, medical history, etc. The Scandinavian Shipping Office, Inc. then [particularly if it has previously placed the seamen on ships operated through the Scandinavian Ship Owners Association], classifies the seamen according to ability, etc. such that they are classified as messboy, yoeman, ordinary seaman, able-bodied seaman, etc.

The Scandinavian Shipping Office, Inc. receives word by way of telegram from the owners of the ships who are members of the association [or by telephone from a Captain of a ship owned by a member] of the seamen required when the ship arrives in port. The Scandinavian Shipping Office, Inc. then sends its registered seamen to the ship to fill the requirements.

The entirety of petitioner's seafaring career is made up of instances in which he reported to the Scandinavian

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[2]See deposition of Ingvar Eide, seriatim.

Shipping Office, Inc. establishment in New Orleans, put his name on the register, waited for an opening, and then from the Port of New Orleans went aboard ships owned by members of the Scandinavian Ship Owners Association.[3] After each voyage, he was re-classified, upward, by the Scandinavian Shipping Office, Inc. in New Orleans, Louisiana.

The NORDPOL flies a Danish flag. Respondent's uncontroverted affidavit shows that virtually all of the stock of the shipowning company is owned by Danish citizens, there being only one stockholder who is a United States citizen, and he owns only .013% of the stock in the company.

Petitioner's injury consisted, among other things, in a *50%* compression of a vertebra. His hospitalization occurred in the Port of New Orleans and his treating physician is in New Orleans.

After petitioner was discharged from the hospital [still in a body cast], he resided in New Orleans, Louisiana, until May 12, 1971.

Respondent insisted that petitioner return to Mexico, and accordingly, he went to Mexico on May 12, 1971, still in a body cast. But as of the time petitioner arrived in Mexico, respondent discontinued paying maintenance. Despite the insistence and demands of petitioner through his attorneys for the continuation of payment of maintenance, respondent did not pay one additional cent of maintenance until [after authorization had been granted by the district court for the filing of an amended complaint for maintenance], August 11, 1971! Thus, respondent left petitioner penniless but in a body cast in Mexico for approximately three months.

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[3]Petitioner's entire work history as a seafaring man is as follows:

Petitioner submits that it is a fact that except for the United States forum, he would not be properly treated and appropriate relief would not be available to him.

Though petitioner is now in Mexico, the New Orleans forum is easily accessible to him.

REASONS FOR GRANTING THE WRIT

The instant decision by the United States Court of Appeals for the Fifth Circuit is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in the case of *Kyriakos v. Goulandris*, 151 F.2d 132 (2d Cir. 1945).

In the *Kyriakos* case, the United States Court of Appeals for the Second Circuit held that the facts that a

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(a) Registered with Scandinavian Shipping Office, Inc. December 26, 1967, and signed on the SUNNY PRINCE as messboy January 3, 1968, in New Orleans, and on May 24, 1968, signed off the SUNNY PRINCE in New Orleans;

(b) Registered May 25, 1968 and signed on THE ALK as deckboy June 25, 1968, in New Orleans, and signed off THE ALK December 5, 1968, in Galveston, Texas, but reported to Scandinavian Shipping Office, Inc. in New Orleans, December 6, 1968;

(c) December 13, 1968, signed on NOPAL REX in New Orleans and signed off the NOPAL REX in New Orleans on September 12, 1968 having been classified by Scandinavian Shipping Office, Inc. as yoeman;

(d) Signed on SCANDIA CLIPPER in New Orleans as able-bodied seaman December 23, 1969 and was discharged from the SCANDIA CLIPPER in New Orleans;

(e) Registered with the Scandinavian Shipping Office, Inc. in New Orleans, March 1, 1971 and signed on the NORDPOL in New Orleans March 8, 1971. Injured in the Port of New Orleans, March 22, 1971.

foreign seaman (a) signed on in an American port for a voyage beginning and ending in American waters, and (b) was injured in an American port, are alone enough to fulfill the minimum requisites for application of the Jones Act to his claim for damages arising from the injury. In the instant case, the seaman signed on in an American port for a voyage beginning and ending in American waters and was injured in an American port, but he was denied a Jones Act remedy.

In the *Kyriakos* case, Judge Augustus Hand cogently stated:

> "The Jones Act, 46 U.S.C.A. §688, is not in terms restricted to American seamen, but gives a right of action to 'any seaman who shall suffer personal injury in the course of his employment.' . . . When Congress used the word 'seaman' in the Jones Act it employed a word of general application, embracing men of any nation who sail the seas. Had it wished to limit the application of the statute to seamen of American citizenship or residence, the words to effectuate the limitation were at hand. The legislators did not see fit to use them. With the adjective 'American' applied to seamen in the title of the very act of which the Jones Act was an amendment we cannot suppose that its omission from the statute itself was merely an oversight. Instead, it appears evident that Congress deliberately chose to leave the word 'seaman' its full and unrestricted meaning applicable to aliens and Americans alike unless in cases like The Paula, 2 Cir. 91 F.2d 1001, which we think may be distinguished in the way hereafter to be mentioned.
>
> Congress has undoubted authority to make a statute of this sort applicable to foreign vessels in

our ports. Patterson v. The Eudora, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002; see also Strathearn S.S. Co. v. Dillon, supra, at page 356, 40 S.Ct. at page 352, 64 L.Ed. 607." (Quoted from 151 F.2d, at 136 and 137).

The foreign shipowners who use our ports for their trade and commerce expect and receive the protection of our laws against both criminal and civil wrongs while in our ports. Accordingly, when they also obtain their seamen from our ports they should be subject to our maritime laws vis-a-vis such seamen at least while they are in our ports.

Similarly, those seamen, such as petitioner, who are attracted to come to America to here obtain employment on voyages beginning and ending in America and are injured in American ports should have the protection of not only our criminal laws but also our civil laws including the Jones Act while in our ports.

As stated by Judge Hand in the *Kyriakos* opinion quoted from above, the words "any seaman" in the Jones Act certainly are broad enough to, and do, include seamen who sign on in our ports for voyages beginning and ending in our ports and who are injured in our ports, and as further stated therein, Congress has authority to make the act applicable to foreign vessels while in our ports.

In the landmark case of *Lauritzen v. Larsen*, 345 U.S. 571, this court ruled that a Danish seamen who signed on a Danish vessel in New York but was injured in Cuban waters was not entitled to Jones Act relief. In denying the Jones Act relief in that case this court stated at the conclusion of its opinion: "the parties are both Danish subjects, the events took place on a Danish ship, *not*

within our territorial waters," 73 S.Ct. at 921 [emphasis added]. Further on in the same paragraph in that decision this court reiterated: "But we find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship *not in our waters*" [emphasis added]. Thus, the situation that existed in the *Kyriakos* case and in the instant case was emphatically distinguished from the situation in *Lauritzen*.

This court in *Lauritzen v. Larsen, supra*, after holding that the Jones Act was not applicable to facts in the *Lauritzen* case, set out seven considerations[4] for future assistance in determining when to apply the Jones Act in cases involving alien seamen. In so doing, this court did not overrule the prior circuit court decisions which had held the Jones Act to be applicable to alien seamen when certain conditions existed. In fact, in footnote 3 of the decision in *Lauritzen*, this court cited several circuit court decisions, including *Kyriakos*. In some of the cases cited the Jones Act had been held applicable and in some it had not. In the footnote, this court stated that "no two of the cases cited present exactly the same basis for application of American law and their contrary results do not necessarily mean inconsistency, but they illustrate different considerations which influence choice of law in maritime tort cases."

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[4]The seven considerations are:

(1) Place of Wrongful Act is New Orleans, Louisiana; (2) Law of the Flag is Danish; (3) Allegiance or domicile of the injured is Mexico; (4) Allegiance of Defendant shipowner is Danish; (5) Place of Contract is New Orleans, Louisiana; (6) Inaccessibility of Foreign Forum; (7) The Law of the Forum.

Subsequently, the question was presented to this court in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, whether, when a majority of the seven factors are against jurisdiction the Jones Act remedy must be denied. There, the ship's flag was Greek, the injured seaman was Greek, the employment contract was Greek, and the Greek forum was available to the seaman. The three factors in favor of the application of United States law were (1) that the injury occurred in United States waters, (2) that 95% of the stock of the employer corporation was owned by a United States domiciliary who was a Greek citizen, and (3) the law of the forum. This court held that the *Lauritzen* test is not a mechanical one and that the significance of one or more factors may override the other considerations.

The decision in *Rhoditis, supra*, (even if there were not already the Second Circuit decision in *Kyriakos*) favors a decision in favor of application of the Jones Act to the instant case. In *Rhoditis*, it was held that the law of the flag, which there was Greek, was not an overriding consideration and that the list of seven factors in *Lauritzen*, was not intended to be exhaustive. It is most respectfully submitted that the facts that petitioner in the instant case, for the entirety of his seafaring career, came to the Port of New Orleans and was hired through and classified through the Scandinavian Shipping Office, Inc. which regularly hires seamen for the Association of which respondent is a member, should give both the petitioner and the respondent a connexity with the United States that should be, under the rule and spirit of *Rhoditis*, an additional factor which should militate in favor of application of the Jones Act.

Thus, since neither *Lauritzen* nor *Rhoditis* overruled *Kyriakos*, and since the reasoning, policy, and rule of

Kryiakos are correct and should be the law of this land, a writ of certiorari should issue to review the decision in the instant case which presents a conflict between Circuits.

Even if *Kyriakos* had not been previously decided, a consideration of the seven factors of *Lauritzen* should require application of the Jones Act and maritime law of the United States to the instant case.

When the seven factors of *Lauritzen* are applied to the instant case, we see:

1. Place of Wrongful Act is New Orleans, Louisiana – favor U.S. law;
2. Law of the Flag is Danish – favor Danish law;
3. Allegiance or domicile of the injured [a Mexican citizen domiciled in Mexico but regularly shipped from the United States Scandinavian Shipping Office, Inc.] – favor Mexican law or possibly U.S. law;
4. Allegiance of the defendant shipowner is Danish – favor Danish law;
5. Place of Contract is New Orleans, Louisiana – favor U.S. law;
6. Inaccessibility of Forum – favor U.S. law;
7. Law of the Forum – favor U.S. law.

We know from *Rhoditis* that the law of the flag is not an overriding consideration and we know from the very reason for setting out in *Lauritzen* the seven considerations for future determinations as to when the United States law is applicable to controversies between foreigners that the allegiance of the shipowner is not an overriding consideration. These two factors are the only ones in the instant case that favor the application of Danish law.

Because of the preponderance of the other factors, in both number and weight, in favor of application of the United States law, the Jones Act and general maritime law of the United States should be held applicable to the instant case.

Because of the conflict between the instant decision of the United States Court of Appeals for the Fifth Circuit and the decision of the United States Court of Appeals for the Second Circuit in *Kyriakos, supra*, and because of the factors favoring application of the Jones Act and the general maritime law of the United States to petitioner's claims arising from his injury, it is respectfully submitted that this petition for a writ of certiorari should be granted, and in due course the case be remanded to the district court for trial on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JESUS NOVELO PERREIRA

versus

DAMPSKIBSSELSKABET NORDEN A/S
and THE M. S. NORD POL

CIVIL ACTION
NO. 71-886
SECTION "F"

– JUDGMENT –

This cause was submitted to the Court on briefs without oral argument on the motion of defendants for summary judgment.

The Court, by Minute Entry Order of December 20, 1971, with written reasons assigned, granted the motion of defendants for summary judgment and directed the judgment be entered; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Dampskibsselskabet Norden A/s and the M. S. Nord Pol, and against plaintiff, Jesus Novelo Perreira, dismissing said plaintiff's suit at his costs.

Dated at New Orleans, Louisiana, this *29th* day of December, 1971.

/s/BENJAMIN W. REISCH, Clerk

APPROVED AS TO FORM:

/s/Lansing L. Mitchell
UNITED STATES DISTRICT JUDGE

Philip E. Henderson, Esq.
Joe M. Inabnett, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JESUS NOVELO PERREIRA
versus
DAMPSKIBSSELSKABET NORDEN A/S
and THE M.S. *NORD POL*

CIVIL ACTION
NO. 71-886

SECTION "F"

Attorney for Plaintiff:

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Attorney for Defendant:

Joe M. Inabnett of Terriberry, Carroll, Yancey & Farrell

This action was originally brought by plaintiff, Jesus Novelo Perreira, an alien seaman, to recover damages under the Jones Act and the general maritime law for injuries sustained aboard the Motor Ship *NORD POL* (hereinafter referred to as *NORD POL*), while at the Port of New Orleans on March 22, 1971. The complaint was later amended to state a claim for maintenance and for damages for refusal to pay maintenance. Defendant has moved to dismiss for lack of jurisdiction.

FINDINGS OF FACT

1.

Plaintiff is a citizen of Mexico who was serving as a seaman and member of the crew of the M/S *NORD POL* on March 22, 1971, on which date he was injured aboard the vessel.

2.

The *NORD POL* is a Danish flag vessel, owned by Dampskibsselskabet "Norden" Aktieselskad (hereinafter referred to as "Norden"), a Danish limited liability company which does not maintain offices in the United States and whose stockholders are all Danish citizens or associations with the exception of one Swedish municipality, and one resident of the United States who owns .013 percent of the stock.

3.

The crew of the *NORD POL* was comprised of nationals of Denmark, Iceland, Honduras, Mexico, Chili and Sweden.

4.

From 1967 through April, 1971, the *NORD POL* called at ports of the United States of America five times.

5.

Plaintiff was hired as a member of the crew of the *NORD POL* through the Scandinavian Shipping Office, Inc., (hereafter referred to as "shipping office"), a licensee of the State of Louisiana.

6.

Shipping office is not licensed by Denmark, nor controlled by any Danish organization.

CONCLUSIONS OF LAW

A Motion to dismiss for lack of jurisdiction may be heard either before trial or be deferred.[1] Normally it will be heard before trial unless determination of the issues will necessitate going into the merits.[2] We think it is proper to entertain the motion at this time.

The seminal case for resolution of jurisdictional issues when foreign seamen and foreign flag vessels are involved is, of course, *Lauritzen v. Larsen*.[3] Although *Lauritzen* was a conflicts of law case, it is now settled that if law of the United States of America is not applicable, its forum is inappropriate and the Court should decline jurisdiction.[4] Jurisdiction doubtlessly exists,[5] but it is discretionary, not compulsory.[6] However, jurisdiction should be exercised unless there is good reason not to.[7] "Good reason" is bottomed upon the type and substantiality of

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[1] Rule 12(d), FRCP.

[2] 2(a) *Moore's Federal Practice*, para. 12.16.

[3] 354 US 571; 73 S.Ct. 921 (1953).

[4] "The real issue in *Lauritzen*, therefore, was choice of law, not the discretionary assumption of jurisdiction, but it seems generally agreed that the criteria set out in that opinion serve as an appropriate yardstick for a district court in deciding whether the United States Courts should accept or decline jurisdiction of a controversy which is essentially foreign." *Anastasiadis v. S/S LITTLE JOHN*, 346 F2d 821, 283 (CA5-1965), cert. den. 384 US 920.

[5] *Lauritzen, supra*, 345 US at p. 575; 73 S.Ct. at p. 924.

[6] *Anastasiadis, supra*, 346 F2d 281, 283 (CA5-1965), cert. den. 384 US 920; see also Norris, the Law of Seamen, (3rd Ed.) Sec. 7.

[7] *The Belgenland v. Jensen*, 114 US 355, 5 S.Ct. 860 (1885).

the contacts of the suit to the United States. *Lauritzen* establishes seven contacts or factors which are controlling and they will be discussed serially. However, it should be emphasized that *Lauritzen* does not establish a point system for jurisdiction–that is, a four to three count in favor of a United States forum would not necessarily indicate that a United States forum is proper. Rather, *Lauritzen* indicates that some factors are of greater importance than others. This is amply discussed in *Bartholomew v. Universe Tankships, Inc.*[8] wherein it was held that "substantial contacts" must exist[9] before an exertion of jurisdiction is proper.

First, the place of the wrongful act was an American port. Place of the wrong, which is still sacrosanct in many landlocked jurisdictions of this country, was greatly debilitated by the Lauritzen and Romero cases[10] and is of minor significance.[11]

Second, the law of the flag is Danish. This is perhaps the single most important factor of the seven, and must prevail unless a heavy counterweight appears.[12]

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[8] 263 F2d 437 (CA2-1959), cert. den. 359 US 1000.

[9] *Bartholomew, supra* at p. 440; cf 47 Va. L. Rev. 1400.

[10] *Romero v. International Terminal Operating Co.*, 358 US 354, 79 S.Ct. 488 (1959).

[11] "To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country. The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circimstances of the place of injury." *Romero*, 358 US at 384.

[12] 345 US 571, 586; 71 S.Ct. 921, 930.

Third, the domicile of the injured party is Mexico. Although plaintiff places reliance on the fact that he has always shipped out of and into New Orleans, this would not, in itself, create an interest in the United States. This is especially so when it appears that plaintiff resides in Mexico and has no intention of remaining permanently in the United States.[13]

The fourth factor is allegiance of the shipowner which, in this case, is Danish. The fact that the shipping office is an American licensee does not make it an alter ego of the ship owner, as plaintiff contends. It does not require citation to authority, but only an appeal to reason and experience, to conclude that the location of the shipping office, which is in reality nothing more than an employment agency, does not transfer the allegiance of the Danish corporation or its stockholders to the United States.

The fifth factor is the place of the contract. This is also of minor importance, according to *Lauritzen*. Evidence that Danish law was to govern the terms of plaintiff's employment while a member of the *NORD POL's* crew indicates that the place of the contract points to Danish law.

The sixth factor is the inaccessibility of the foreign forum. This is perhaps the most difficult of the *Lauritzen* principles to apply. Clearly, in choice of law it is of no importance, but it clouds the issue when the question of jurisdiction is an issue.[14]

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[13] There seems to be a question of whether he could legally remain here. See deposition of plaintiff, pp. 60-68.

[14] "This inaccessibility of foreign forum) might be a persuasive argument for exercising a discretionary jurisdiction to adjudge a controversy; but it is not persuasive as to the law by which it shall be judged." *Lauritzen, supra*, 345 US at pp. 589-90, 73 S.Ct. at p. 932.

Before reviewing the seventh factor, law of the forum, we think it appropriate to note here that, in any event, Danish law controls the substantive rights of plaintiff. Inaccessibility of the forum almost ceases to be a factor in this case in light of the evidence that plaintiff has received the full benefits available under Danish law.

In view of the number and magnitude of the contacts with Denmark—law of the flag, allegiance of the shipowner and, possibly, place of the contract, and the lack of any real contact with the United States of America, justice would not be served by applying the law of the latter. The domicile of the injured, being Mexico, does not invest this country with an interest in his welfare so as to require the shelter of American maritime law. Thus, only the first and sixth factors indicate a United States forum. This, we believe, requires us to dismiss this action unless the plaintiff can show that he has not received the full benefit of Danish law.

The seventh factor, law of the forum, does not mean that simply because jurisdiction exists, the law of the United States of America can be applied. This is especially so where the connection between this country and the controversy is slight and fortuitous. We think this principle does not detract from application of Danish law.

Accordingly, we must declaine jurisdiction and dismiss the suit.

Let judgment be entered accordingly.

December 16, 1971

/s/Lansing L. Mitchell
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1458
Summary Calendar*

JESUS NOVELO PERREIRA,
Plaintiff-Appellant,

versus

DAMPSKIBSSELSKABET NORDEN A/S
and the M.S. NORDPOL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

(July 3, 1972)

Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-526

JESUS NOVELO PERREIRA,
Petitioner,

versus

DAMPSKIBSSELSKABET NORDEN A/S and the M. S. NORDPOL,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

Statement of the Facts 2

Statement of the Law 9

Conclusion 17

Certificate 20

TABLE OF AUTHORITIES

Hellenic Lines, Ltd. et al. v. Rhoditis, 398 U.S. 306, 26 L.Ed. 2d 252 (1970) 9, 10

Kyriakos v. Goulandris, (2 Cir. 1945), 151 F.2d 132 .. 10

Lauritzen v. Larsen, 345 U.S. 571, 97 L.Ed. 1254 (1953) 9, 10

National Steam Navigation Company, Ltd. v. Dyer, et al., 105 U.S. 24, 26 L.Ed. 1001 (1882) 9

Romero v. International Terminal Operating Co. (Spanish Line), 358 U.S. 354, 3 L.Ed. 2d 368 (1959) 12

Shahid v A/S Ludwig Mowinckels Rederi, (S.D. N.Y. 1964), 236 F. Supp. 751 15

Tjonaman v. A/S Glittre, (2 Cir. 1965), 340 F.2d 298, cert. den. 381 U.S. 925, reh. den. 382 U.S. 873 15

United States of America v. Flores, 289 U.S. 137, 77 L.Ed. 1086 (1933) 9, 11

Wildenhus' Case, 120 U.S. 1, 30 L.Ed. 565 (1887) .. 9, 11

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-526

JESUS NOVELO PERREIRA,
Petitioner,

versus

DAMPSKIBSSELSKABET NORDEN A/S and
The M. S. NORDPOL,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

The petitioner's application for a writ of certiorari should be denied and the decisions of the lower courts should not be disturbed or modified in any respect. The district court, in a well-reasoned and sound opinion, granted the motion of respondent for a summary judgment and dismissed petitioner's suit, on the correct conclusion that petitioner was not entitled to relief under the Jones Act, 46 U.S.C. 688, or under the general maritime law of the United States. The United States

Court of Appeals for the Fifth Circuit concluded that the decision of the district court was sound in fact and in law, and, after placing the case on the summary calendar, the court later affirmed the district court holding.

As will be shown hereafter, the decisions of the two courts below are correct and in no way call for or suggest any reason for this Court to grant a writ of certiorari. Furthermore, and as also will be shown hereafter, petitioner's statement of the facts is inaccurate in a number of important details, and his assertion that there is a conflict in the decisions of the Courts of Appeal is unfounded when the applicable opinions are properly interpreted in light of the guidelines set forth by this Court.

STATEMENT OF THE FACTS

Petitioner is and has been a citizen and resident of Mexico all of his life.[1] At the time in question, petitioner was living in Merida, Mexico, where he resided with his family and where he returned after the accident.[2]

Petitioner's only connection with the United States has been related to his obtaining a non-immigrant visa on several occasions which allowed him to remain in the United States 30 days.[3] He entered the United States as a foreign seaman in transit, and was permit-

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[1]Depo. Pereyra p. 3; R. 7 (Note: Petitioner's name has been consistently misspelled; it is spelled "Pereyra" on his passport.)
[2]Id. at 3 & 46; R. 7 & 50
[3]Id. at 9; R. 13

ted to obtain employment aboard foreign flag vessels that call at United States ports.[4] Petitioner first entered the United States on a seaman's visa in 1968 and sailed aboard several foreign ships during 1968 and 1969.[5] The record establishes that petitioner sought foreign employment by this means, rather than by joining foreign flag vessels at Mexican ports, because he could avoid penalties imposed upon Mexican citizens who sailed foreign from Mexican ports.[6] The record does not establish what petitioner did during most of 1970, but, on March 1, 1971, he returned to New Orleans on a non-immigrant (temporary) visa aboard Pan American Airways Flight 508, again solely to obtain employment aboard a foreign flag vessel.

On March 8, 1971, about one week after arrival, petitioner ascertained through the Scandinavian Shipping Office in New Orleans that a job as a seaman was available aboard the M/S NORDPOL, a Danish vessel.[7] Petitioner signed aboard the vessel that same day and executed the required Danish Seaman's contract. The agreement contained, among other provisions, the statement that both parties were bound by Danish law and Danish terms and conditions of employment, as established by the Danish Seamen's Union agreement with the shipowner.[8] Such contracts are validated (stamped) by the Danish Consulate.[9] Petitioner knew, having been advised both verbally and

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[4]Id. at 7; R. 11, Depo. Eide pp. 39-40; R. 121-122.
[5]Depo. Pereyra p. 6; R. 10
[6]Id. at 56; R. 60
[7]Id. at 11; R. 15
[8]Depo. Eide p. 13; R. 95
[9]Id. at 15; R. 97

in writing, that the ship was a Danish flag vessel, that Danish law would govern all relationships between him and the owners throughout his term of employment, and that his work would be performed under the orders and supervision of the Danish officers who commanded the vessel.[10]

The ship proceeded from New Orleans to Houston and then returned to New Orleans for further loading before going foreign. Petitioner allegedly was injured aboard the vessel at New Orleans. He was removed from the vessel and received medical attention, the cost of which was borne by respondent, at the New Orleans Public Health Service Hospital.[11]

In May, 1971, two weeks after he was pronounced fit to travel, petitioner returned to his home in Mexico, where he still resides.

The record fully establishes that respondent has paid petitioner everything due him under Danish law.[12] Danish law provides that, in the case of illness or injury, the seaman is to receive full medical treatment plus one month's sick wages in the amount of $226.55. After the expiration of the first month of illness or injury, an additional daily allowance is paid from the Danish State Insurance Company, which after deduction of Danish taxes, totals $6.61 a day.[13] Pursuant to these laws, respondent provided petitioner wages

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[10]Id. at 31-32 & 37; R. 113-114 & 119
[11]R. 160
[12]Ibid
[13]R. 159

for service aboard the vessel and all Danish benefits to which he was entitled, including sick wages, air transportation, and daily living expenses, along with medical treatment at New Orleans and later at his home in Merida, Mexico.[14]

M/S NORDPOL is a bona fide Danish Flag vessel, owned by respondent, Dampskibsselskabet Norden Aktieselskab. The owning company is a limited liability company organized and existing under and by virtue of the laws of the Kingdom of Denmark.[15] It is established that all of the shareholders, with two completely minor and insignificant exceptions, are Danish citizens, or Danish corporations, associations or institutions having absolutely no connection, directly or indirectly, with the United States.[16] The sole exceptions of stock ownership are a Swedish municipality authority and a single United States resident who owns .013% of the company's stock.[17]

Respondent has no affiliated or subsidiary companies or corporations in the United States or relationship or dealings in or with the United States and is not in any way affiliated with any person, firm, or corporation that does business in the United States.[18]

M/S NORDPOL is an ocean-going motorship which was delivered to respondent at Nakskov Shipyard in June, 1955. She has been continuously owned by re-

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[14]R. 160
[15]Findings of Fact, R. 139
[16]Ibid
[17]Ibid
[18]R. 157

spondent since that time, and has been at all times employed in foreign (worldwide) trade for the most part under time-charters. Since August, 1968, the vessel has traded to the east coast of Canada, to the west coast of South America, to Europe, to the West Indies, to Mexico, and to the United States.[19]

On the occasions when the vessel has called under charter at United States ports, the ship has been serviced by local United States agents. On the occasion when the vessel called in New Orleans, respondent appointed Biehl & Company to act for the inbound and outbound clearance of the ship and for other details relating to the loading of soybean meal for carriage and discharge in Europe.[20]

The crew of the M/S NORDPOL at the time in question consisted of 31 men who were for the most part (22 in all) Danish nationals, and nine others who were citizens of Iceland, Honduras, Mexico, Chile, and Sweden. All crewmembers were employed under and by virtue of the Danish Seamen's Union agreement with the owners which recited that Danish law would control all of the terms and conditions of employment.[21] From 1967 through April, 1971, the NORDPOL called at ports of the United States only five times.[22]

The Scandinavian Shipping Office, Inc., which referred petitioner to the NORDPOL, is not licensed by

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[19]R. 158
[20]R. 158 & 159
[21]R. 159
[22]Findings of Fact, R. 139

Denmark or controlled by any Danish organization.[23] To the contrary, Scandinavian Shipping Office, Inc. is licensed by the State of Louisiana and is operated solely by one employee, whose sole purpose and function is to act as a referral agency for the convenience of foreign seamen and foreign ships.[24] About 80% of the seamen referred to ships through the Scandinavian Shipping Office in New Orleans are Norwegian seamen referred to Norwegian vessels. About 10% of the seamen referred to ships through the office are referred to Swedish vessels, and the remaining 10% are referred to Danish vessels.[25] The company has nothing to do with the operation and maintenance of ships or with personnel aboard ships; it acts only as a referral agency for foreign seamen to obtain employment aboard foreign flag vessels.[26] The company does not act as agent or representative of vessels and plays no part whatsoever in the handling of personnel after they are employed or when they are sick or in need of medical or other attention.[27] Immediately after the referral of a seaman is accomplished, the seaman reports on his own to the master of the vessel in order to determine whether he wishes to accept the engagement and for the master to decide whether he wishes to accept the seaman.[28] If at this stage, the parties decide to enter into a contract of employment, the contract is then executed aboard the vessel, under the

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[23]Depo. Eide pp. 23 & 38; R. 107 & 120
[24]Id. at 36 & 38; 118 & 120
[25]Id. at 24; 106
[26]Id. at 26; 108
[27]Id. at 22; 104
[28]Id. at 13; 95

law of the flag of the vessel and under the terms and conditions of employment specified by the law of the vessel's flag.[29]

In the case of the vessel involved herein, petitioner obligated himself to the terms and conditions of employment set forth under Danish law and specified in the contract previously entered into between the Danish owners and the Danish union that represented the seamen aboard the vessel.[30] In fact, the record establishes that the seamen are routinely advised in advance that they will be subject exclusively to the law of the flag of the vessel aboard which they serve.[31] Advices regarding the applicability of the contract are passed on to the seamen verbally and in writing.[32] As required by the law of the vessel's flag, and as required by the contract of employment between the Danish union and the Danish owner, the seaman is obliged to join and must become a member of the Danish union as a prerequisite to employment aboard the Danish vessel.[33] The record establishes that these prerequisites of employment were all complied with by petitioner at the time of his employment aboard the NORDPOL in March, 1971.

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[29]Id. at 27; 109
[30]Ibid
[31]Depo. Eide pp. 31-32 & 37; R. 113-114 & 119
[32]Id. at 33; 115
[33]Id. at 37; 119

THE JONES ACT AND THE GENERAL MARITIME LAW OF THE UNITED STATES ARE NOT APPLICABLE AND THE DECISIONS OF THE DISTRICT COURT AND OF THE COURT OF APPEALS DECLINING JURISDICTION AND DISMISSING THE SUIT WERE CORRECT AND THE WRIT OF CERTIORARI SHOULD BE DENIED

The laws of the country of a vessel's registry and flag govern all matters relating to her internal operations, which includes all matters relating to personal injury and illness.[34]

In light of the above principle of law, the lower courts in the present case correctly concluded that the law of the United States does not apply in this instance. The number and magnitude of contacts in the present case all predominate in favor of Denmark. The shipowner is a bona fide Danish company having no connection, directly or indirectly, with the United States. The shipowner's base of operations is and has always been Denmark. The vessel is navigated and operated predominantly by Danish nationals through a Danish union under a Danish contract of employment verified and supervised by the Danish Consulate when in foreign ports. The ship flies the Danish flag and operates

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[34] *Wildenhus' Case*, 120 U.S. 1, 30 L.Ed. 565; *United States of America v. Flores*, 289 U.S. 137, 77 L.Ed. 1086; *National Steam Navigation Co., Ltd. v. Dyer, et al*, 105 U.S. 24, 26 L.Ed. 1001; *Lauritzen v. Larsen*, 345 U.S. 571, 97 L.Ed. 1254; *Hellenic Lines Ltd. et al. v. Rhoditis*, 398 U.S. 306, 26 L.Ed. (2d) 252

under charter on worldwide foreign voyages. From 1967 through April, 1971, the ship called at ports in the United States only five times.

In the courts below, and again in this Court, petitioner continues to misinterpret, misconstrue, and place improper interpretations upon the case of *Kyriakos v. Goulandris*, 151 F. (2d) 132. In *Kyriakos*, unlike the present case, the shipowner had offices in the United States and was actually doing business as a shipowner through its United States offices. Nevertheless, the Court's statement, made long before this Court set out the proper guidelines in *Lauritzen* and *Rhoditis*, supra, that signing aboard a foreign flag vessel in an American port and being injured in an American port is sufficient "on reason and on authority" to sustain jurisdiction, is so patently contrary to the holding of *Lauritzen* and *Rhoditis*, supra, as to make it clear that *Kyriakos* was overruled by *Lauritzen*. Indeed, a reading of the dissent in *Kyriakos*, at p. 139, rendered by Learned Hand, really formed the base of reasoning accepted by this Court in *Lauritzen*, wherein this Court gave paramount importance to the law of the flag. As Judge Hand said, and as this Court held in *Lauritzen* and affirmed in *Rhoditis:*

> "... it is generally accepted law that in all matters relating to the 'internal economy or discipline' of a ship 'the law of the flag' controls. ... And it seems to me most undesirable, except for some pressing reason of domestic policy to disregard it. ... As I have just said, I can discover no reason of policy or of authority for displacing that law. ..."

Furthermore, a review of the seven considerations set out in *Lauritzen* and *Rhoditis* will show why the district court and the Court of Appeals concluded — and, we submit, correctly concluded — that the law of the United States is not applicable to the present case.

First, the place of the wrongful act in the instant case was not really the Port of New Orleans because the accident allegedly occurred aboard the M/S NORDPOL. The United States has consistently and without semblance of deviation held that the law of the United States does not govern "the general relation of the rights and duties of the officers and crew towards the vessel or among themselves" when the vessel involved is a foreign flag ship. See *Wildenhus' Case*, supra. Accordingly, it is the established law of the United States that the "jurisdiction and laws of a nation accompany her ships ... into ports and harbors . . . for the general purpose of regulating the rights, duties, and obligations of those on board." *United States of America v. Flores*, supra. As a result, the M/S NORDPOL, a Danish registered vessel flying the Danish flag, was recognized by the United States while at the Port of New Orleans in March, 1971 — as well as by all nations and wherever she called — as part of the territory of Denmark, and she did not lose that national identity while in the territorial limits of the United States. Furthermore, as a Danish vessel, she was and is governed by the laws of Denmark at all times — "wherever she goes" — and those laws alone "regulate the mutual relations" of her master and her crew and her owners. As a consequence, the

laws of the United States cannot interfere in her internal operations, including the relationship between the seamen and her owners for the purpose of determining rights and liabilities for personal injury or illness.

It hardly seems necessary to examine the rationale of this principle, or to point out why it has developed in international law. Obviously, without understanding among nations that the law of a vessel's flag shall govern her internal affairs — one of the most obvious and elementary of which is the regulation of personal injuries and illnesses — substantial conflicts in the laws of the nations would develop, and the shipowners could never know from day to day under what law a vessel is operating. The legal relations of shipowner and crew toward each other would vary from day to day by the accident of place. As this Court said in the case of *Romero v. International Terminal Operating Co. (Spanish Line)*, 358 U.S. 354, at p. 384, 3 L.Ed. (2d) 368, at p. 389 (1959):

> "* * * *To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country.* The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury." [Emphasis ours]

It is clear, therefore, that since the accident occurred aboard a Danish vessel, it did not occur, under correct legal interpretation of international maritime law, in the United States but on an entity — the foreign ship — recognized as Denmark, or Danish territory.

Secondly, nothing further need be said concerning the fact that the M/S NORDPOL was and is a Danish flag vessel. Petitioner has indeed conceded, brief p. 20, that the ship here was a "Danish flag — a factor in application of Danish law."

Thirdly, the allegiance and domicile of petitioner is and always has been Mexico, where he makes his home, where he lives and resides, and where he returns after employment aboard foreign flag vessels. In fact, petitioner's only connection with the United States has been during 1968, 1969 and 1971, when he has been in New Orleans a few days to seek employment aboard foreign flag vessels to avoid penalties that would be imposed had he joined such vessels in Mexico. Petitioner is not and has never been a resident of the United States or domiciled in this country. His appearances here have been of short duration under a temporary visa to seek employment aboard foreign ships and then immediately to leave. There is no evidence that petitioner has ever remained any appreciable time in the United States, or that he has ever had any intention of remaining in this country. As the district court correctly stated, the appearance

of a seaman at a United States port to obtain employment can hardly create such an interest in the United States as to call into play the laws of this country and, more particularly, to make them applicable to a foreign seaman while he is aboard a foreign flag vessel. As a result, petitioner's contention that the allegiance of plaintiff to the United States "is as much ... as any other country" is untenable because petitioner's allegiance is clearly to Mexico and not to the United States.

The fourth factor, is allegiance of the shipowner which, in this case, is Denmark. Petitioner argues, however, that the Danish owner has "an alter-ego and/or employee ... permanently in the United States in order to procure seamen", and from this wholly unsupported comment petitioner reasons that respondent's allegiance is to the United States rather than to Denmark. The record establishes, however, that the allegiance of Dampskibsselskabet "Norden" Aktieselskab, respondent, is and has always been the Kingdom of Denmark and that the Scandinavian Shipping Office, Inc., the alleged "alter-ego", is a Louisiana licensed company operated by a single individual on behalf of numerous Scandinavian and Norwegian shipowners and unions solely to refer foreign seamen for employment. As the district court said, Scandinavian Shipping Office "is in reality nothing more than an employment agency [and] does not transfer the allegiance of the Danish corporation or its stockholders to the United States."

It should be noted that a Dutch alien was referred to a Norwegian vessel through the New York branch of the Scandinavian Shipping Office in *Tjonaman v. A/S GLITTRE,* (2 Cir. 1965) 340 F. (2d) 298, cert. den. 381 U.S. 925, reh. den. 382 U.S. 873, but the court did not consider this fact significant in the weighing of *Lauritzen* factors. The seaman there was identically situated with petitioner, except that he was injured beyond United States territorial waters. The Second Circuit had no hesitancy in applying Norwegian law and emphasized the Norwegian articles and Norwegian union membership. The court properly concluded that Tjonaman's rights should be no greater than his shipmates under Norwegian law.

The same result was reached in *Shahid v. A/S LUDWIG MOWINCKELS REDERI,* (S.D.N.Y. 1964) 236 F.Supp. 751, where an Egyptian seaman was injured in New York, the port from which he signed aboard the vessel. There, as here, the Scandinavian Shipping Office had referred the seaman to the Norwegian vessel, but the court found plaintiff failed to show sufficient factors to displace the law of the flag. Neither should this Court be misled by petitioner's unfounded attempt to relocate respondent's true allegiance.

The next and fifth factor is the place of the contract. Although the ship at the time of the contract was in New Orleans, the place of the contract was aboard the Danish vessel, which, as previously shown, has been consistently interpreted by our courts to be part of the country whose flag the vessel flies. In addition, in the instant case, the record is clear and undisputed

that petitioner entered into a Danish contract and was obligated to be bound by Danish law and Danish terms and conditions of employment; and that he fulfilled the Danish prerequisite of becoming a member of the Danish Seamen's Union. Consequently, and as the district court held, "the place of the contract points to Danish law" and away from American law.

As to the sixth factor, the accessibility of the foreign forum, there is also little dispute, despite petitioner's contentions to the contrary. Petitioner has been paid his full benefits under Danish law. The statement of petitioner that he was not paid Danish benefits is unsupported and completely inaccurate. The truth is that the attorneys for petitioner were attempting to prevent petitioner from being returned to his home in Mexico after the Public Health doctors had declared petitioner fit for travel and able to return home. When the doctors and the Immigration authorities cleared petitioner for return to Mexico, appropriate arrangements were made and proper advances were tendered and paid. In any event, petitioner's arguments concerning payments or lack of timely payments can hardly overcome the only significant fact involved relating to the foreign forum: the forum has been and is accessible and the Danish benefits due petitioner have been paid.

The last factor, the law of the forum, obviously ceases to be a factor, in light of the evidence that petitioner has received the full benefits available under Danish law. As the district court stated, the law of the United States cannot be applied "where the con-

nection between this country is slight and fortuitous; ... this principle does not detract from application of Danish law."

In summary, and viewed in proper perspective, the number and magnitude of the contracts with Denmark – the occurrence aboard a Danish vessel, the law of the flag, the allegiance or domicile of petitioner, the allegiance of the shipowner, the place of the contract aboard a Danish vessel, the accessibility of the Danish forum — all require the application of the law of Denmark and not the law of the United States to the instant case.

CONCLUSION

The application for a writ of certiorari should be denied. The holding and judgment of the lower courts, declining jurisdiction and dismissing this suit, is in every respect sound in law, consistent with the decisions of this Honorable Court and in no way in conflict with the decisions of the courts of appeal. Under the guidelines — indeed, the prerequisites — set forth in *Lauritzen* and *Rhoditis*, the law of the United States is not applicable to this case. This conclusion results from the following undisputed facts and law, all of which is reflected in the record of this case, in the decisions of this Court, and in the decisions of the lower courts in the instant case:

(1) The vessel, the M/S NORDPOL, has been engaged throughout its entire period of operation and ownership by respondent as a

bona fide foreign flag vessel, flying the flag of and registered in Denmark;

(2) Under international law, as received and accepted in the courts of the United States, the law of the flag governs the internal order and economy of a ship, including the rights and duties of seamen and owners in matters involving personal injury and illness; in this instance, the Danish, and not the American law;

(3) One of the most fundamental of the matters of internal order and economy is the relationship of the crew of a vessel to her master and owner in matters involving personal injury and illness; and these, as elementary propositions of law, are governed by the law of the flag of the vessel, regardless of where the personal injury or illness occurred or arose, unless other unusual and extreme factors are involved pertaining to the interests and welfare of the United States and United States citizens, to cause our laws to be superimposed upon and take precedence over the laws of a vessel's flag and country; and no such extenuating circumstances exist nor have even been suggested in the present case;

(4) Nothing in our law or in any of this Court's decisions suggests or indicates that the laws of the United States are applicable to the bona fide Danish vessel involved in this case;

(5) Any attempt by our courts to exercise jurisdiction in this case and apply the law of the United States would be a plain disregard and violation of international law and a breach of international faith between the United States and Denmark; and any such application would be a step toward international chaos in shipping circles, as one could certainly anticipate retaliatory action by Denmark and other Scandinavian countries, who would be disposed to make their laws applicable to American ships under identical or similar circumstances;

(6) And, finally, in the instant case, viewed in light of the applicable decisions of this Court and the opinion and judgment of the lower courts, the application for a writ of certiorari should be denied.

Accordingly, petitioner's application for a writ of certiorari should be denied.

Respectfully submitted:

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CERTIFICATE

I hereby certify that copies of the above and foregoing brief have been served upon attorneys for petitioner by depositing same in the United States mails, postage prepaid, and properly addressed to them at their office.

New Orleans, Louisiana, November ——, 1972.

William E. Wright